COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2243 **Cir. Ct. No. 2003CV986**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

FOX RIVER CONDOMINIUM ASSOCIATION, INC.,

PLAINTIFF-APPELLANT,

V.

THE TOWNHOMES OF RIVER PLACE, INC., AND HERITAGE DEVELOPMENT OF WISCONSIN, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: JAMES KIEFFER, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. The Fox River Condominium Association, Inc. (the Association), appeals from an order determining that The Townhomes of River Place, Inc., and Heritage Development of Wisconsin, Inc. (the Developer),

are obligated to pay condominium assessments for units when the construction of a unit progressed to the point that it was eligible to apply for an occupancy permit.[1] We conclude that the condominium declaration, when read as a whole, otherwise provides that assessments are not owed on unconstructed units. We affirm the order of the circuit court.

¶2 In 1997, the Developer recorded a declaration to create the River Place Condominiums and the Association was formed. The Developer controlled the Association until December 2001 when control was transferred to the condominium unit owners. The first condominium was sold in August 1997, and the last of the 140 units was sold in August 2002. The Association commenced this action for a declaration of when the Developer became obligated to pay monthly installments for annual condominium assessments for units to which the Developer held title. The Association asserts that more than $474,000 is owed for annual assessments for all units, including unconstructed units, owned by the Developer between August 1997 and August 2002.

¶3 In ***Aluminum Industries, Corp. v. Camelot Trails Condominium Corp.***, 194 Wis. 2d 574, 583-84, 535 N.W.2d 74 (Ct. App. 1995), the court held that the requirement in WIS. STAT. § 703.16(2) (1993-94),[2] that unit owners pay

[1] The appeal is taken from the final order entered by Judge James Kieffer denying the Association's request for attorney fees and interest and ordering judgment for the unpaid assessment fees. However, Judge Lee Dreyfus entered the nonfinal orders determining the preliminary issue of when the assessment was owed for unconstructed units and denying the Association's motion for reconsideration.

[2] The same provision is now found WIS. STAT. § 703.16(2)(a) (2003-04). It provides: "Funds for the payment of common expenses and for the creation of reserves for the payment of future common expenses shall be obtained by assessments against the unit owners in proportion to their percentage interests in the common elements or as otherwise provided in the declaration."

(continued)

assessments for common expenses, obligates owners of property on which there is no constructed unit to pay assessments. The court recognized that the definition in WIS. STAT. § 703.02(15) of a "unit" as "a part of a condominium intended for any type of independent use, including one or more cubicles of air," does not suggest any limitation to constructed units for purposes of assessment. *See* ***Aluminum Indus.***, 194 Wis. 2d at 582; § 703.02(15). However, the analysis did not stop with the statutory provisions regarding condominiums. The ***Aluminum Industries*** court further recognized that a different assessment arrangement could be otherwise provided in the condominium declaration. ***Aluminum Indus.***, 194 Wis. 2d at 585-86. The court concluded that the declaration and amendments at issue made a distinction between the land and the dwelling or living units. ***Id.*** at 587-88. It ultimately held that unit owners were not subject to assessment until construction of dwelling units on their properties. ***Id.*** at 590.

¶4 This dispute falls under the second part of the ***Aluminum Industries*** analysis—whether the River Place condominium declaration departs from the statutory scheme and otherwise provides a different assessment arrangement. A question of law is presented which we review independently. ***Id.*** at 581.

¶5 The River Place declaration has many similarities to the declaration examined in ***Aluminum Industries*** in that it serves to distinguish between the living or dwelling units and the real property. For example, the declaration provides that the real estate, as distinct from and in addition to the building and improvements constructed or to be constructed on the property, is submitted to the

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All remaining references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

provisions of the condominium act. *See* ***id.*** at 586 (land subject to the declaration distinguished from building). Also, the description of the buildings in the declaration makes reference to the living units contained therein and details the space and number of rooms in each living unit. *See* ***id.*** (description of units referred to floor plans, layouts, and number of rooms).

¶6 The most telling provision in the River Place declaration is that "unit" is defined as "excluding the land underneath same."[3] The exclusion provision is different from the statutory provision of "unit." *See* WIS. STAT. § 703.02(15). The exclusion of land underneath falls under the holding in ***Aluminum Industries*** that when the land is distinguished from "unit," a "unit" is not subject to assessment until it is constructed and is something other than just land.

¶7 The Association looks to provisions in that part of the declaration titled, "Covenant for Assessments," as being crystal clear that all units are obligated to pay assessments. However, by necessity those provisions rely on the definition of "unit," which excludes the land underneath. Contrary to the Association's position, the provision indicating that annual assessments commence as to all units when the first unit is conveyed is not rendered superfluous by our holding that assessments are not due on unconstructed units.

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[3] The River Place declaration defines "unit" as

> one (1) or more cubicles of air at one or more levels of space or one or more rooms or enclosed spaces located in one or more floors (or parts thereof) in a building and bounded along such boundaries as shown on the building and floor plans attached hereto as Exhibit B, together with all facilities and improvements therein contained, excluding the land underneath same.

That provision simply means that all completed units are assessed once the first unit is conveyed.

¶8 We affirm the circuit court's conclusion that the Developer did not owe assessments for units that were not yet constructed. The Association does not dispute that eligibility for an occupancy permit signifies sufficient completion to permit assessment as a unit. The Association acknowledges that we need not address its claim for prejudgment interest if we affirm the circuit court's ruling that assessments were not owed for unconstructed units.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.